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NOTE: the good info is at the bottom, highlighted.

Finding chinks in the death penalty machine: Florida lawyers serve on ABA team

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Fling together Fourth Circuit State Attorney Harry Shorstein and former Florida Supreme Court Justice Leander Shaw on an ABA team evaluating Florida's death penalty and you get an interesting mix.

Shorstein is a proponent of the death penalty.

Shaw is opposed to the death penalty.

But both respected lawyers agree on this much: Florida's death penalty system is fundamentally fl awed, and if you are going to have a death penalty statute, it ought to be fair.

They, along with six others on the Florida team, signed their names to the 460-page Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report.

The report, released September 17, did not take a position pro or con on the death penalty or ask for a moratorium, but it does urge action by all three branches of state government to make Florida's death penalty system more fair and accurate (see sidebar).

"Those of us who favor the death penalty, we are struggling to right the problems and right the ship so it will continue to sail," Shorstein said. "I must confess to you, I am not sure it's possible."

Said Shaw: "First, up front, I am opposed to the death penalty. I think it's a system that at the least needs improving. It's sort of a crap shoot, really. If you get a good lawyer, chances are better than if you had a bad lawyer, no matter what the evidence is.

"If you come from a certain socioeconomic class, your chances of being subjected to the death penalty seemingly are greater. And when you've been in the system, you know instinctively that some of the things I am talking about now are the truth. But when you are called upon by skeptics who say, 'Back that up,' many times you can't. This is why we have tried to put together some stats. Let those who make these types of determinations have it at least available to them."

What's available online is the executive summary and full report, complete with charts and statistics, dealing with every step involved in a death case: law-enforcement interrogation practices, DNA testing labs, biases in charging and sentencing racial and ethnic minorities, shoddy lawyering, confused penalty phase jurors, secret clemency proceedings, and maintaining the independence of judges who preside over death cases.

Go to www.abavideonews.org/ABA340 and click on the state of Florida. Links to the report and supporting materials will pop up.

[Image Omitted: ZI-0CYV-2006-NOV01-IDSI-9-2.JPG ]

Already, the lawyers for death row inmate Arthur Dennis Rutherford, Linda McDermott and Martin McClain, seized on the report's findings as reasons to stay their client's execution. But October 12, six days before Rutherford's execution, the Florida Supreme Court denied relief, saying the ABA report does not rise to the level of "newly discovered evidence."

While the court denied relief in an individual case, members of the Florida team still hope for action by the state to correct what they view as major problems, documented after nearly two years of study. What do they hope will happen next? Here's what the team members told the News:

\* Christopher Slobogin, a University of Florida law professor who chaired the team, said, "Despite the best efforts of many legislators, judges, and lawyers, much more needs to be done to ensure that Florida's death penalty system avoids executing the innocent. Florida has released more people from death row than any other state, which suggests the system has serious problems."

Slobogin believes all three branches of government "have a role to play" in implementing the team's recommendations.

"The Supreme Court could help implement our proposals to revisit the jury instructions used in death penalty cases, carry out further study of how racial bias can be reduced, and exempt people with serious mental illness from the death penalty," Slobogin wrote in an e-mail from Stanford University, where he is spending this year.

"It could also create some momentum for our proposed commission to investigate Florida's 22 exoneration cases and other capital cases raising factual innocence claims, as did the Supreme Court in North Carolina, the first state to establish such a commission.

"The executive branch (specifically the governor's office) could revisit its clemency procedures in light of our recommendations for more transparency in the clemency process. And the prosecutors should investigate the extent to which statewide criteria for charging in capital cases can be developed, which we recommend in light of the significant charging variations between counties.

"The legislature will hopefully consider all of our proposals, particularly those proposing the commission to investigate exoneration cases, a requirement that death sentences be based on unanimous jury verdicts, and the revamping of the compensation scheme and qualification criteria for trial and post-conviction counsel."

\* Eighteenth Circuit Judge O.H. Eaton, Jr., who teaches about the death penalty at the Florida College of Advanced Judicial Studies and the National Judicial College, said, "What I would do if I were king? I would scrap the Florida scheme. "I would either go to the Georgia scheme, where the death decision" is up to the jury "or go to the Nebraska scheme, that has decided to do that."

In Florida, the team found that jurors are often confused that they must only be "reasonably convinced" as to the existence of mitigating factors, and it is not required that they be proven beyond a reasonable doubt.

As Eaton has explained in materials from which he teaches: If the jury finds one or more aggravating circumstances and determines these circumstances sufficient to recommend the death penalty, it must determine whether sufficient mitigating circumstances exist that outweigh the aggravating circumstances. The jury then recommends whether the defendant should be sentenced to life in prison or death.

Florida is the only state in the nation that allows the jury to find both the existence of aggravating circumstances and make a recommendation that the defendant receive the death penalty by a majority vote. Alabama requires at least 10 jurors recommend the death penalty. Most states require unanimity.

In the Georgia scheme, the jury determines the sentence instead of the judge. The jury must state in its verdict the aggravating factors found beyond a reasonable doubt, and if the death penalty is unanimously recommended, the court must impose the death penalty.

Judge Eaton said a "starting point" of where to go from here may be the recommendations of the creation of commissions "to at least get open discussion about the problems. It would be helpful if the commissions are composed of people with authority to do something about the problems and also composed of people who know something about it. It's nice to have decisionmakers on a commission who have expertise in the area. I'm not saying legislators don't have expertise. They do, but they don't deal with these cases like we do."

\* Michael Minerva, a Tallahassee lawyer who formerly served as director of the Office of Capital Collateral Representatives of Florida and retired from the Second Judicial Circuit Public Defender's Office after nearly 30 years, said the "No. 1 issue to me" is that Florida stands "virtually alone" in the country in not requiring the unanimous verdict in the penalty phase.

"That is a matter of great urgency," he said. The Florida Supreme Court, in State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005), called upon the legislature "to revisit Florida's death penalty statute to require some unanimity in the jury's recommendations." The issue was discussed and dismissed during 2006 legislative committee meetings without bills moving forward.

Minerva also hopes funding for conflict trial attorneys who handle death cases will be addressed.

"Right now, there is a statutory cap of $3,500, which is totally unrealistic. You have to have a hearing to go over the cap. That has to put a damper on somebody who might otherwise take a case," Minerva said. "There is no provision for periodic payments. Though in statute the Justice Administrative Commission is supposed to establish some rules for interim payments, they haven't done that yet."

\* Sylvia Walbolt, a Carlton Fields lawyer and shareholder, said, "The highest priority to me involves sufficient financing to ensure good defense of people on death row. We just are not funding counsel to defend these cases sufficiently.

"As far as what I hope will happen, I would hope the Florida Supreme Court would look at it. I would hope The Florida Bar would look at it. I would hope the Florida Legislature would look at it. If we are going to have a death penalty, we have to ensure it operates in a race-neutral and fair way."

\* Mark Schlakman, a program director for Florida State University's Center for the Advancement of Human Rights, said, "The team is hopeful that the report will serve as a basis for action.

"The effort is to place the report in the hands of practitioners and policymakers and judges at every level who might one day have responsibilities relating to the death penalty. Add to that list the relevant committees and leadership of the Florida Legislature. Irrespective of one's position on the death penalty--given this report was not intended to support or oppose and did not call for a moratorium--there is a compelling need for the state to address the issues and problems that were identified. Why? To minimize the risk that an innocent person may one day be put to death."

\* Shorstein, the prosecutor on the team, said, "I found myself agreeing with the recognition of significant problems, but not agreeing with what has been argued to be a significant number--and this is a tricky word--'exonerations' from Florida's death row.... There is a tremendous difference between innocent and not guilty."

The report notes that "Florida leads the nation in death row exonerations." Since 1973, the State of Florida has exonerated 22 death row inmates - who served approximately 150 years in prison before being released. During that same time, Florida executed 60 death row inmates.

"Therefore, the proportion exonerated exceeds 30 percent of the number of executed," according to the report.

Roger Maas, executive director of the legislature's Commission on Capital Cases, did not serve on the ABA Florida team, but points out his commission released on October 13 its own study of the 22 inmates released from death row, titled "Truly Innocent?" That study's conclusion: "The guilt of only four defendants was subsequently doubted by the prosecuting office or governor or Cabinet members."

"Regardless if the number is 22 or 18 or four or one, if you are the one, it's unacceptable," Shorstein said.

Pointing out that only 13 percent of death row inmates have actually been executed (381 are currently on death row), Shorstein said: "Sometimes you have to ask the question: Is it worth it? Is it appropriate if the number of actual cases where sentences are carried out is so small? Are we doing it correctly? And death penalty litigation has had a tremendous impact on workload. It's significant. When you factor in the amount of time to do a death penalty case, appeal it to the Supreme Court, and then the postconviction litigation, it's unbelievable."

For example, the report notes that although capital cases comprise only 3 percent of all criminal felony filings, they occupy half of the Florida Supreme Court's docket. The report also cites another study that found in Florida, a death sentence case costs about $2.5 million more than a life sentence of 40 years.

"It comes to my ultimate conclusion, and I was reluctant to sign the report," Shorstein said. "In effect, I am a death penalty proponent, but we must do everything in our power to make sure it is imposed appropriately. And I'm not sure we can do that."

Former Justice Shaw's top priority for what he hopes happens next: "Read it thoroughly with an open mind. We're hoping that it does not sit on a shelf and gather dust. I recognize that is the fate of many of these reports."

By Jan Pudlow

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